Filed 2/2/10 In re B.R. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re B.R., a Person Coming Under the Juvenile Court Law.	B212791 (Los Angeles County Super. Ct. No. FJ42518)
THE PEOPLE, Plaintiff and Respondent, v. B.R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Cynthia Loo, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Affirmed as modified and remanded with directions.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Xiomara Costello and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition alleging that B.R. (minor) committed the offense of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1).[1] The juvenile court found that minor was a person described by Welfare and Institutions Code section 602 and ordered him home on probation. The juvenile court set a maximum confinement time of four years.

Minor appeals on the grounds that: (1) the juvenile court erred by failing to declare on the record whether minor's wobbler offense was a felony or a misdemeanor, and the matter must be remanded; (2) if, on remand, the juvenile court declares the offense a misdemeanor, the order requiring minor to provide a DNA sample should be stricken; (3) the juvenile court erred in setting a maximum confinement time, since minor was not removed from the physical custody of his parents, and the maximum term set must be stricken. We modify the trial court's order and remand with directions.

FACTS

On November 28, 2007, Isabel A., who was 13 at the time of the hearing, was walking with L. R. on the physical education field at their middle school. L.R. began calling out to minor, who was 14 years old at the time. She was screaming his name insistently, and he "got mad." From a distance of four or five feet, Isabel saw minor walk over to L.R. very quickly and put a knife to her neck for about five seconds. He started punching her arm with his other hand. The knife was three or four inches long. Minor's face looked angry. L.R. asked to be let go and was crying. After punching L.R. about three or four times, minor let her go and returned to his friends. Isabel told L.R. she should "go tell somebody."

L.R. recalled that she told minor, "Come here," and he came and put a flip knife to her neck. She said nothing to him, and he said nothing to her. She was almost falling, and he let her go after a few minutes. He also punched her on the arm once.

---

1 All further statutory references are to the Penal Code unless otherwise indicated.

The two girls went to see Luis Aquilar (Aguilar), the school dean. Aguilar remembered that L.R. and Isabel were crying and upset when they approached him. L.R. was unable to speak and was almost in a panic, which was unlike her. After hearing what occurred, Aguilar put out a call for personnel to be on the lookout for minor. Minor was taken to the office and was searched by another dean, Mr. Ariana (Ariana). Ariana found a small slot that had been cut into the lining of minor's backpack. In the slot was a red flip knife that was at most three and one-half inches long. Minor said he did not know the knife was there. The deans took minor to an Officer Thomas, a school police officer, who informed Aguilar that minor denied all the charges.

Officer Clement Adame, Jr. (Adame) of the school police also interviewed minor. When asked what had happened, minor said he had a knife and may have said he pulled it out on a student. Minor said he had the knife for protection. The dean gave Adame the knife that was used.

Defense Evidence

Lawrence Garrett (Garrett), the defense investigator, interviewed Isabel, who did not tell him minor punched L.R. She said L.R. wanted to speak to minor and ask him not to change classes because he was funny. Isabel said she and L.R. laughed, and she believed minor thought they were laughing at him.

Minor said he barely knew L.R. and she was not his friend. On the day of the incident, L.R. called him over and said she had heard he had a knife, and she asked him to show it to her. He did so and then put it back in his pocket. Another girl said something funny and minor laughed. L.R. got mad and started saying bad words to him and the other girls. Minor got mad and called her a fat cow and a tank and other things. He believed L.R. looked sad because her feelings were hurt.

Ariana found minor walking and asked him if he had a knife. Minor said he did and gave it to him. He was shocked to learn that he was accused of putting a knife to L.R.'s neck. He had a knife that day only because he had found it by the doughnut shop. He told only one friend he had it, and he supposed this friend had told L.R. He told his

friend he had it for protection, but he did not recall why he needed protection. Minor showed the knife to L.R. only because she threatened to tell on him if he did not. Minor said he never saw Isabel during the incident.

DISCUSSION

I. Failure to Declare Offense a Felony or Misdemeanor

A. Proceedings Below

After extensive argument, the juvenile court stated: "Okay. Thank you. As to the petition filed on January 29, 2008, the court is going to sustain it as written. With regard to disposition, probation is recommending that this young man remain at home." The juvenile court placed minor home on probation under specified conditions, set a maximum confinement time of four years, and ordered DNA sampling. The minute order of the hearing states that the offense was declared to be a felony.

B. Argument

Minor contends that the record makes clear that the juvenile court did not make the required declaration. His case should be remanded so that the juvenile court may exercise its discretion and make a determination on the record.

C. Relevant Authority

Welfare and Institutions Code section 702 provides that, in a juvenile proceeding, "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court *shall* declare the offense to be a misdemeanor or felony." (Italics added.) "The requirement is obligatory" and "requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*).) Where, as here, the juvenile court orders probation, "the required declaration would constitute a record, for the purposes of determining the maximum term of physical confinement *in a subsequent adjudication*, whether the prior offense was a misdemeanor or a felony." (*Id*. at pp. 1206-1207.)

A juvenile court's failure to make the required declaration under Welfare and Institutions Code section 702 does not automatically require a remand of the matter to the juvenile court. The record in a given case "may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) If so, the failure to make an explicit declaration would be harmless error. Therefore, "[t]he key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid*.)

D. Remand Required

Section 245, subdivision (a)(1) is a "wobbler" subject to a felony or misdemeanor characterization at the discretion of the juvenile court.[2] Consequently, the court was required to make "an explicit declaration . . . whether [the] offense would be a felony or misdemeanor in the case of an adult." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204; see also Cal. Rules of Court, rule 5.780(e)(5) [in a § 602 matter, "[i]f any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and expressly declare on the record that it has made such consideration, and must state its determination as to whether the offense is a misdemeanor or a felony"].)

It is true that the petition alleged the offense as a felony, and the juvenile court set a maximum term of confinement of four years, which is a felony-level punishment. However, as the People concede, these factors alone are insufficient to show that the juvenile court exercised its discretion to declare the offense a felony. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1208 ["neither the pleading, the minute order, nor the setting of a felony-

---

[2] Section 245, subdivision (a)(1) provides in pertinent part that assault with a deadly weapon "shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony"].)

As the Supreme Court in *Manzy W.* explained, a declaration that a minor has committed a felony, as opposed to a misdemeanor, "may . . . have substantial ramifications in future criminal adjudications of the minor, including under Penal Code section 667, subdivision (d)(3)(A)—the 'Three Strikes' law." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) Moreover, """"[i]t is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. [Citation.]""" (*Ibid*.) A reviewing court cannot take lightly the juvenile court's obligation to declare an offense either a felony or misdemeanor.

Given the record as whole, we cannot say that "the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) The juvenile court never responded to defense counsel's argument that, if the juvenile court sustained the petition, it should "do that as a misdemeanor." The juvenile court's later statement that it was sustaining the petition "as written" does not show the juvenile court was aware of its discretion to determine "which description applie[d]" to the offense and that it "made such consideration." (Cal. Rules of Court, rules 5.780(e)(5), 5.790 (a)(1).) The statement referred only to the charge as written by the prosecutor, and as noted, "the preparation of a petition is in the hands of the prosecutor, not the court. The mere specification in the petition of an alternative felony/misdemeanor offense as a felony has been held insufficient to show that the court made the decision and finding required by section 702. [Citation.]" (*In re Ricky H.* (1981) 30 Cal.3d 176, 191.) Finally, we decline to adopt the People's suggestion that we consider the circumstances of the crime to determine if the juvenile court would characterize it as a felony on remand, which would amount to speculation. We note that the probation report stated that minor had no prior record, and the juvenile court gave no indication as to whether it had considered this point. We

conclude that, in this case, remand for an express declaration would not "be merely redundant'" (*Manzy W.*, *supra*, at p. 1209), and we remand to the juvenile court.

II. DNA Sample Requirement

Minor also contends, and the People concede, that if the juvenile court finds the offense to be a misdemeanor, minor cannot be ordered to provide a DNA sample. The juvenile court ordered the minor to provide a DNA sample pursuant to section 296, subdivision (a)(1), which requires the collection of DNA from anyone convicted of a felony, including a juvenile whose adjudication under Welfare and Institutions Code section 602 was based upon the commission of a felony. When a minor has been adjudicated to have committed an offense that would be either a misdemeanor or felony if committed by an adult, however, the requirement to provide a DNA sample is not triggered until the juvenile court expressly declares the offense to be a felony. (*In re Nancy C.* (2005) 133 Cal.App.4th 508, 512.)

Accordingly, we agree with both parties that the probation condition requiring minor to provide a DNA sample should be stayed pending remand. Should the juvenile court subsequently declare the offense to be a misdemeanor, it should strike its order requiring the minor to provide a DNA sample pursuant to section 296, subdivision (a)(1). If the sample has already been collected, the minor may seek relief pursuant to the expungement procedure provided by section 299. (*In re Nancy C.*, *supra*, 133 Cal.App.4th at p. 512.)

III. Setting of Maximum Confinement Time

Minor contends the juvenile court erred by setting a maximum term of physical confinement in light of its dispositional order placing minor on probation and releasing him to the custody of his mother. He urges us to strike the maximum term of confinement from the judgment.

Welfare and Institutions Code section 726, subdivision (c) provides: "If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor

may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." When a minor is not removed from the physical custody of his parents, Welfare and Institutions Code section 726, subdivision (c) does not apply, and it is error for the juvenile court to impose a maximum term of confinement. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541; *In re Ali A.* (2006) 139 Cal.App.4th 569, 574.)

Here, the juvenile court placed minor on probation and released him to the custody of his mother. The maximum term of confinement provision must be stricken.

DISPOSITION

We modify the order to strike the maximum confinement term set by the juvenile court. We remand with directions to the juvenile court to expressly declare whether the underlying offense is a felony or misdemeanor as required by Welfare and Institutions Code section 702. If the juvenile court determines the offense to be a misdemeanor, it may not order minor to provide DNA samples. In all other respects, the wardship order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST